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No. 83-453

IN THE

Supreme Court of the United States

OCTOBER TERM 1983

NATIONAL LABOR RELATIONS BOARD,

Petitioner

v.

UNITED PARCEL SERVICE, INC.,

Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF OF UNITED PARCEL SERVICE, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE CASE

This case arose in 1979 from the decision of Respondent, United Parcel Service, Inc. ("UPS"), to discharge two employees, Robert W. Bowlds and David E. Perkins. Bowlds and Perkins subsequently filed charges with Petitioner, National Labor Relations Board ("NLRB" or "Board"), in which they alleged that they had been terminated for engaging in conduct protected by the National Labor Relations Act ("Act"). The Regional Director issued a complaint, and the matter was tried before Administrative Law Judge Phil W. Saunders ("the ALJ"). Throughout the trial, UPS maintained that the discharges had nothing to do with activities protected by the Act, and that the employees had been terminated for overstaying breaks and falsifying timecards. (A. 62a-67a).[1]

On October 30, 1980, the ALJ issued an Opinion which concluded that the discharges of Bowlds and Perkins violated §§ 8(a)(1), (3), and (4) of the Act. The Board adopted the ALJ's Opinion on May 21, 1982 and ordered that Bowlds and Perkins be reinstated with back pay.[2] The Court of Appeals refused to enforce the Order on the ground that the NLRB had misallocated the burden of proof. (A. 24a-26a). The case was remanded for further consideration. (A. 26a).

REASONS FOR DENYING THE WRIT

The instant Petition rests on only one argument. According to the Board, this Court's decision in *NLRB v. Transportation Management Corp.*, 103 S.Ct. 2469 (1983), conclusively demonstrates that the Court of Appeals erred and that this case should be summarily reversed. The NLRB's position is funda-

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1. All citations so designated are to the Appendix attached to the NLRB's Petition for Certiorari.

2. Although the NLRB made several modifications in the ALJ's Opinion, none concerned the issues relevant to this Petition. UPS has filed a separate Petition for Certiorari, No. 83-71, which seeks review of the NLRB's refusal to defer to the findings of joint grievance panels which upheld the discharges of Bowlds and Perkins. Another issue that once was in the case, concerning the distribution of literature at a UPS facility, is no longer contested.

mentally flawed, because *Transportation Management* is not directly on point, and the matter must be reviewed by the Board to determine how this Court's decision should be applied to these facts.

Transportation Management upheld the Board's test for apportioning the burden of proof in "dual motive" cases, *i.e.*, situations in which discrimination under the Act was a "motivating factor" in the penalizing of an employee, but the employer contends that the identical penalty would have been imposed for legitimate reasons absent the discrimination.[3] The proper analysis is two-pronged. First, the General Counsel has the "burden of proving" all the "elements" of the unfair labor practice. 103 S.Ct. at 2474. Second, if this burden is carried, the employer may "avoid being adjudicated a violator by showing what his actions would have been regardless of the forbidden motivation." This latter type of argument is essentially an "affirmative defense," with the employer bearing the burden of persuasion. *Id.*

It must be emphasized that under *Transportation Management*, the burden of persuasion does not "shift" to the employer *until* General Counsel has *proven* that discrimination under the Act motivated the adverse action against the employee. This point was made explicitly in the following passage:

> . . . The Board held that the General Counsel of course had the burden of proving that the employee's conduct protected by § 7 [of the Act] was a substantial or a motivating factor in the discharge. Even if this was the case, *and the employer failed to rebut it*, the employer can avoid being held in violation of §§ 8(a)(1), and 8(a)(3) by proving by a preponderance of the evidence that the discharge rested on the employee's unprotected conduct as well and that the employee would have lost his job in any event.

103 S.Ct. at 2473 (emphasis added, footnote omitted). Thus, the burden of persuasion remains with General Counsel until the

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3. This test was first applied in *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enf'd.*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

employer has "failed to rebut" the Board's proof of discrimination under the Act. As the *Transportation Management* opinion explained in footnote 5, "The Board has not purported to shift the burden of persuasion on the question of whether the employer fired [the employee] at least in part because he engaged in protected activities." 103 S.Ct. at 2473 n.5.

In this case, the ALJ and NLRB did not follow the *Transportation Management* roadmap. The ALJ stated:

> In the instant case, I have found that the General Counsel made a *prima facie* showing sufficient to support the inference that protected conduct was the motivating factor in the suspension and discharges of Bowlds and Perkins, and in my view the Respondent has failed to demonstrate that such actions would have taken place in the absence of the protected conduct. In accordance therewith, the Respondent is in violation of Sections 8(a)(1), (3), and (4) of the Act.

(A. 81a) (emphasis in original).

The text of the ALJ's Opinion graphically demonstrates that he did not require General Counsel to *prove* by a preponderance of the evidence that UPS was motivated by discrimination under the Act when it discharged Bowlds and Perkins. To the contrary, the ALJ and NLRB relieved General Counsel of the burden of persuasion as soon as he established a mere *prima facie* inference of illegal discrimination. Therefore, when UPS attempted to rebut the *prima facie* case of discrimination, its evidence was judged under the wrong burden of proof.

The instant case is actually controlled by *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). In *Burdine*, a Title VII case, the Supreme Court held that the plaintiff bears the burden of proof in convincing the trier of fact that the defendant intentionally discriminated against the plaintiff. 450 U.S. at 253. *Transportation Management* distinguished *Burdine* on its facts, because the later case involved the burden of persuasion *after* it is established that illegal discrimination was a motivating factor in the penalty imposed upon an employee. *Transportation Management*, however, also indicated that *Bur-*

dine remains good law and is applicable in the context of unfair labor practice cases before the Board when the facts are apposite. 103 S.Ct. at 2473 n.5. This case is controlled by *Burdine*, because the ongoing controversy is whether discrimination was a motivating factor in the discharges, not whether the discharges would have occurred in the absence of discrimination. Significantly, the Court of Appeals in this case explicitly relied on *Burdine* in finding that the NLRB misapplied the burden of proof. (A. 22-24a). As the ALJ and NLRB plainly violated *Burdine* by prematurely relieving General Counsel of the burden of persuasion, the Board's attack on the decision of the Court of Appeals has no merit.

This case cannot be resolved until the *Transportation Management* analysis is implemented properly. The NLRB should be given an opportunity to apply the appropriate burden of proof and to develop an administrative record. It would disserve the interest of judicial economy for this Court to grant certiorari in this case where, due to a unique procedural error, the ALJ and the NLRB failed to apply the Board's own burden of proof. Since either the NLRB or this Court must review the record in this case, and since additional evidence, or at least additional findings of fact are needed, there is no reason for this Court to review the remand order despite the intervening change in the law.

CONCLUSION

In light of the foregoing, UPS requests that this petition be denied.

Respectfully submitted

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